

2001

Calvin W. Clayton, Sr. Trustee, Calvin W. Clayton, Sr., and Winifred U. Clayton, C. Comstock Clayton II, Bruce U. Clayton, Calvin W. Clayton, Jr., and Geraldine V. Griffiths v. Calvin A. Behle, Executor of the Estate of . Comstock Clayton, Deceased; Calvin A. Behle, T. Bowring Woodbury and Ralph D. Cowan, Trustees : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

CALVIN W. CLAYTON, SR., Trustee, )  
CALVIN W. CLAYTON, SR., and )  
WINIFRED U. CLAYTON, C. COMSTOCK )  
CLAYTON II, BRUCE U. CLAYTON, )  
CALVIN W. CLAYTON, JR., and )  
GERALDINE V. GRIFFITHS, )

Plaintiffs, )

-vs- )

CALVIN A. BEHLE, Executor of the )  
Estate of C. Comstock Clayton, )  
Deceased; CALVIN A. BEHLE, T. )  
BOWRING WOODBURY and RALPH D. )  
COWAN, Trustees, )

Defendants. )

-vs- )

GERALDINE V. GRIFFITHS, )

Cross-Plaintiff, )

-vs- )

CALVIN W. CLAYTON, SR., Trustee, )  
CALVIN W. CLAYTON, SR., C. )  
COMSTOCK CLAYTON II, BRUCE U. )  
CLAYTON and CALVIN W. CLAYTON, JR., )

Cross-Defendants. )

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APPELLANT'S BRIEF

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APPEAL FROM THE THIRD  
JUDICIAL DISTRICT COURT OF SALT  
LAKE COUNTY, STATE OF UTAH

---

CASE NO. 14662

FILED

NOV 1 - 1976

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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CALVIN W. CLAYTON, SR., and )  
WINIFRED U. CLAYTON, C. COMSTOCK )  
CLAYTON II, BRUCE U. CLAYTON, )  
CALVIN W. CLAYTON, JR., and )  
GERALDINE V. GRIFFITHS, )

Plaintiffs, )

-vs- )

CALVIN A. BEHLE, Executor of the )  
Estate of C. Comstock Clayton, )  
Deceased; CALVIN A. BEHLE, T. )  
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COWAN, Trustees, )

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-vs- )

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Cross-Plaintiff, )

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CALVIN W. CLAYTON, SR., Trustee, )  
CALVIN W. CLAYTON, SR., C. )  
COMSTOCK CLAYTON II, BRUCE U. )  
CLAYTON and CALVIN W. CLAYTON, JR., )

Cross-Defendants. )

BRIEF OF APPELLANT  
CALVIN A. BEHLE,  
EXECUTOR OF THE ESTATE  
OF C. COMSTOCK CLAYTON,  
DECEASED.

CASE NO. 14662

---

NATURE OF THE CASE

This is a case in equity whereby the Plaintiffs seek to establish the validity of a certain trust instrument executed by C. Comstock Clayton in 1963 and to impress a constructive trust upon 125 shares of Clayton-Macfarlane Company stock.

The defendants are first, the Executor of the Estate of C. Comstock Clayton who holds 25 shares of the 125 shares in dispute as part of undistributed residue of Mr. Clayton's estate and secondly, the Trustees of the C. Comstock Clayton Foundation which in 1969 received as a gift from Mr. Clayton 100 shares of the disputed stock, and which as residuary beneficiary under Mr. Clayton's Will would receive the other 25 shares of disputed stock subject to this litigation.

#### DISPOSITION OF THE CASE BELOW

The court held that the trust executed by C. Comstock Clayton in 1963 was a valid irrevocable trust and that the beneficiaries of said trust are entitled to receive the 125 shares of stock currently held by the Trustees of the C. Comstock Clayton Foundation and/or the Executor of the C. Comstock Clayton Estate.

#### RELIEF SOUGHT ON APPEAL

The defendants herein named seek to have the judgment of the lower court set aside on the basis that the 1963 Trust had been properly terminated, and under the facts the equitable relief sought by plaintiffs should be denied.

#### STATEMENT OF THE FACTS

C. Comstock Clayton, who was born and died a resident of Utah, owned one-half or 125 shares of all of the stock of the Clayton-Macfarlane Company, a Utah corporation, whose principal asset was and still is a 7,461 acre ranch in East Canyon, Utah. (F.4 R.973). C. Comstock Clayton left as heirs one son, Calvin

Whitney Clayton, Sr., three grandsons, Charles Comstock Clayton, Bruce U. Clayton and Calvin Whitney Clayton, Jr., who are all sons of Calvin Whitney Clayton, Sr.; one granddaughter, Geraldine V. Griffiths (formerly Geraldine Robertson), the daughter of a deceased daughter of C. Comstock Clayton. Plaintiff, Winifred U. Clayton, is the estranged wife of Calvin W. Clayton, Sr.

#### THE CLAYTON FAMILY TRUST AND ITS REVOCATION

On October 22, 1963, C. Comstock Clayton as Donor and Co-trustee and Calvin W. Clayton, Sr., his only son, as co-trustee executed an instrument, entitled the CLAYTON FAMILY TRUST (Exhibit 1 below), which was drafted by Mario Ciullo, a Boston, Massachusetts attorney employed by both Messrs. Clayton and the Clayton Securities Company. C. Comstock Clayton was referred to in said Trust as a resident of the State of Utah. On November 1, 1963, pursuant to a letter from Mr. Mario Ciullo dated October 23, 1963 (Exhibit 2 below), the 125 shares of Clayton-Macfarlane Company stock owned by C. Comstock Clayton were transferred in Utah by Grant Macfarlane, the president and transfer agent of said company and Mr. Clayton's Utah attorney, to fund the Clayton Family Trust, and a new Certificate Number 26 (Exhibit 18 below) representing 125 shares and in the name of the Clayton Family Trust was returned by Macfarlane to Mr. Ciullo.

The beneficiaries of the Clayton Family Trust were C. Comstock Clayton for life, then his son Calvin W. Clayton, Sr. for life, and then the issue of Calvin W. Clayton, Sr. This Trust was devoid

of any language as to its revocability or irrevocability. It did, however, contain language which would allow the trustee to invade the principal to provide for the health, maintenance or comfort of the two life beneficiaries. (Exhibit 1 below).

On or about May 16, 1967, pursuant to a request by C. Comstock Clayton that Stock Certificate Number 26, of the Clayton-Macfarlane Company be transferred to him personally, Grant Macfarlane informed Mr. Clayton that he would transfer said stock if Calvin, the other co-trustee, would join in the assignment of Certificate Number 26. (Ab. 23, R. 138). Pursuant to such indication, a stock power appointing Grant Macfarlane attorney for the purpose of transferring said stock on the books of the Clayton-Mcfarlane company was executed by C. Comstock Clayton and Calvin W. Clayton on May 16, 1967 (Exhibit 19 below).

On June 9, 1967, Stock Certificate Number 26 was cancelled by Grant Macfarlane and Stock Certificate Number 39 (Exhibit 20 below) was issued and delivered to C. Comstock Clayton individually. (F. 16 R. 975).

#### CLAYTON BENEFICIARY VOTING TRUST

By letter to C. Comstock Clayton in Salt Lake City, Utah dated July 12, 1967, (Exhibit 3 below), Mario Ciullo sent Mr. Clayton an instrument prepared by Mr. Ciullo (Ab. 3, Tr. 17) called the CLAYTON BENEFICIARY VOTING TRUST. In the July 12, 1967 letter, Mr. Ciullo asked Mr. Clayton to execute the trust before a Utah notary public. Also enclosed with this letter was Stock Certifi-

cate Number 39 for 125 shares of Clayton-Macfarlane Company stock (Exhibit 20 below). Mr. Ciullo asked that Mr. Clayton endorse and deliver this Stock Certificate to Grant Macfarlane along with the Trust Instrument for transfer to the trust. In this letter, Mr. Ciullo further advised Comstock Clayton to keep the Trust Certificate in Utah "because of possible legal complications. . .in Massachusetts," but asked for a letter from Mr. Macfarlane indicating that the transfer to the Trust had been made. No such letter was ever received by Mr. Ciullo. (Ab. 62 Tr. 407, 408).

On July 20, 1967, Stock Certificate Number 39 in the name of C. Comstock Clayton individually was delivered to Grant Macfarlane with an endorsement by Comstock Clayton. (F. 17 R. 975). The 125 shares of stock were then issued as Certificate Number 40 in the name of the Clayton Beneficiary Voting Trust and delivered to Mr. Clayton. (F. 17 R. 975; Ab. 28 R. 162). On August 29, 1967, C. Comstock Clayton as Donor and co-trustee executed and acknowledged the Clayton Beneficiary Voting Trust. (F. 18 R. 975). The beneficiaries of this trust were to be C. Comstock Clayton for life; then one-fifth of the remainder as follows:

1. Calvin W. Clayton, Sr. and Winifred U. Clayton jointly and with right of survivorship.
2. Comstock Clayton II.
3. Bruce U. Clayton
4. Calvin W. Clayton, Jr.
5. Geraldine V. Robertson (now Geraldine V. Griffiths)

This trust, like the Clayton Family Trust, provided for the invasion of the principal for the health, maintenance, or comfort of C. Comstock Clayton during his life if in the discretion of the trustees it was necessary. (Exhibit 4 below). But again, no express power to revoke was included.

#### THE C. COMSTOCK CLAYTON TRUST

Shortly before the execution of the Clayton Beneficiary Voting Trust, on June 18, 1967, C. Comstock Clayton executed a third trust denominated the C. COMSTOCK CLAYTON TRUST. (Exhibit 6 below). This Trust was to be funded by \$250,000 in cash and securities and C. Comstock Clayton was Donor and co-trustee with Mario Ciullo as co-trustee. The beneficiaries under this Trust were to be C. Comstock Clayton for his life; then Calvin W. Clayton, Sr. and his wife, Winifred U. Clayton, for life; and then the issue of Calvin W. Clayton, Sr. were to receive the income in per stirpes shares until the youngest reached or would have reached 25 years of age at which time all principal and income would be divided and distributed in per stirpes shares. (Exhibit 6 below).

Two years later by letter of May 20, 1969 to Mario Ciullo, C. Comstock Clayton wrote that said C. Comstock Clayton Trust had never been activated because his granddaughter (cross-plaintiff Geraldine V. Robertson (now Griffiths)) had not been included as a beneficiary. He further indicated his willingness to execute and activate said trust if it was revised to include his granddaughter and her issue as beneficiaries and to have as the res the

proceeds of a \$250,000 subordinated loan made to Clayton Securities Company by C. Comstock Clayton. (Exhibit 10 below). Again, Ciullo included no express power to revoke in the drafts of this Trust.

#### THE C. COMSTOCK CLAYTON FOUNDATION

On June 1, 1968 C. Comstock Clayton, as Donor, and Calvin A. Behle, T. Bowring Woodbury and Ralph D. Cowan, as Trustees, executed a Trust Agreement establishing THE C. COMSTOCK CLAYTON FOUNDATION. (F.19 R.975). The purpose of said Trust is to benefit charitable, religious, scientific, literary or educational activities, and it has been used since its establishment primarily to support the Utah Symphony Orchestra. On or about February 5, 1969, Comstock Clayton alone endorsed Stock Certificate Number 40 which had been issued in the name of the Clayton Beneficiary Voting Trust, and asked Grant Macfarlane to cancel said certificate and issue a new certificate in his name individually. (F.20 R.975; Ab.28 R.164). While Mr. Macfarlane initially objected on the basis that Calvin W. Clayton, Sr. had not endorsed the certificate, upon Mr. Clayton's statement that the certificate had never been delivered to the Clayton Beneficiary Voting Trust and that the stock was his alone and he had the right to have it transferred, Mr. Macfarlane cancelled Stock Certificate Number 40 and issued and delivered Stock Certificate Number 41 (Exhibit 22 below) for 125 shares of Clayton-Macfarlane Company stock to C. Comstock Clayton individually (Ab.25 R.149).

On September 17, 1969 C. Comstock Clayton presented Stock Certificate Number 41 for cancellation to Vicci Eckhart, Grant

Macfarlane's secretary, who, pursuant to Mr. Macfarlane's instructions cancelled Certificate Number 41 and issued Certificate Number 42 for 25 shares of Clayton-Macfarlane Company stock to C. Comstock Clayton individually (Exhibit 34 below) and Certificate Number 43 for 100 shares of said stock to the C. Comstock Clayton Foundation. The original Certificate Number 43 (Exhibit 23 below) was erroneously issued to the Clayton Beneficiary Voting Trust and was cancelled by Miss Eckhart at that same time in favor of another Certificate Number 43 to the Foundation. (Exhibit 25 below; Ab.55-57 R.359-369.)

MR. CLAYTON'S LAST WILL

C. Comstock Clayton executed his Last Will and Testament on September 30, 1969. (Exhibit 29 below.) The following were named as beneficiaries in the following amounts or the equivalent under said Will:

1. Mabel Clayton (wife)	\$50,000
2. Geraldine V. Robertson (granddaughter)	all personal property + \$25,000
3. Utah Symphony	10,000
4. Irving E. Clayton (brother)	10,000
5. Rae K. Jeppson (sister-in-law)	10,000
6. Calvin Whitney Clayton, Sr. (son)	80,614
7. Winifred U. Clayton (daughter-in-law)	10,000
8. Charles Comstock Clayton II (grandson)	25,000
9. Bruce Underwood Clayton (grandson)	25,000
10. Calvin Whitney Clayton, Jr. (grandson)	25,000
11. Mary Sanford McKahan	5,000
12. Shirley Elizabeth Horsley Bennetts	10,000
13. Kathryn V. McGoldrick	5,000
14. C. Comstock Clayton Foundation	residue



By codicil dated December 31, 1970, Mr. Clayton added Effie Kelsey as a beneficiary in the amount of \$5,000. (Exhibit 35 below.)

On October 21, 1969 C. Comstock Clayton announced to the Board of Trustees of the C. Comstock Clayton Foundation his donation of 100 shares of Clayton-Macfarlane Company stock to the Foundation. (Exhibit 30 below.)

On either October 7 or 13, 1969, the C. Comstock Clayton Trust was executed by C. Comstock Clayton as Donor and co-trustee and by Mario Ciullo as co-trustee. (Exhibits 7 and 8 below.) As redrafted, the beneficiaries of the Trust were to be C. Comstock Clayton for life; then Calvin W. Clayton and Geraldine V. Robertson (now Griffiths) in equal shares for life; at the death of Calvin W. Clayton to Winifred U. Clayton, his wife, for life; at the death of the survivor of Calvin W. Clayton or Winifred U. Clayton to the issue of Calvin W. Clayton per stirpes; at the death of Geraldine V. Robertson to her issue per stirpes. This Trust was to be funded by \$360,000 in promissory notes of the Clayton Securities Corporation under a subordinated capital loan agreement with C. Comstock Clayton and was eventually so funded in December of 1970 (Ab. 60 R. 390).

On December 7, 1970 Mario Ciullo telephoned Calvin A. Behle and Grant Macfarlane indicating that the shares of Clayton-Macfarlane Company stock in dispute here were supposed to be held by a Massachusetts trust. (Ab.50 R.325.) This was the first indication Mr. Behle had of any Massachusetts trusts. (Ab.49 R.317.) In checking with C. Comstock Clayton on December 30, 1970, Mr. Behle was informed by Mr. Clayton that while there had been a trust in

Massachusetts, he had never activated it. Mr. Macfarlane was likewise so informed. (Ab.28 R.164).

C. Comstock Clayton died on February 14, 1971 of cerebral arteriosclerosis and thrombosis. (Exhibit 16 below.)

On May 28, 1971 a creditor's claim for 125 shares of Clayton-Macfarlane Company stock was filed on behalf of the six beneficiaries of The Clayton Beneficiary Voting Trust only, by Calvin W. Clayton as surviving co-trustee, with Appellant as Executor appointed by the Probate Division of the District Court of Salt Lake County, Utah. (Exhibit 32 below.) Said claim was denied by the Executor of C. Comstock Clayton's estate on June 9, 1971.

On December 23, 1971, suit was filed in the District Court of Salt Lake County by Calvin W. Clayton, Sr., Trustee, and Calvin W. Clayton, Sr., Winifred U. Clayton, C. Comstock Clayton II, Bruce U. Clayton, Calvin W. Clayton, Jr. and Geraldine V. Griffiths as plaintiffs, who were the beneficiaries of the 1967 Trust, to have the Court declare that Calvin A. Behle, as Executor of the Estate of C. Comstock Clayton and Calvin A. Behle, T. Bowring Woodbury and Ralph D. Cowan as Trustees of the C. Comstock Clayton Foudation held 125 shares of Clayton-Macfarlane Company stock for the benefit of the Clayton Family Trust or the Clayton Beneficiary Voting Trust and to have said defendants transfer said stock to Calvin W. Clayton, Sr. as surviving trustee of both trusts. (R.442.)

For ready reference, a concise table of key dates and events as well as a table indicating the history of the shares of Clayton-Macfarlane Company stock here in question are included as Exhibits A and B.

### STATEMENT OF POINTS

- I. THE COURT BELOW FAILED TO CONSIDER THE EQUITABLE DEFENSES RAISED BY APPELLANT, CALVIN A. BEHLE, EXECUTOR.
  - A. Clean Hands
  - B. Laches
- II. THE ACTIONS OF PLAINTIFFS WOULD MAKE IT INEQUITABLE TO GRANT THEM RELIEF AND THE DOCTRINE OF LACHES SHOULD BE APPLIED TO DENY THEIR CLAIMS.
- III. CALVIN AND HIS SONS SHOULD HAVE FILED A PROPER CLAIM WITH THE EXECUTOR UNDER THE 1963 RANCH TRUST, AS THEY DID TOGETHER WITH THEIR MOTHER AND COUSIN UNDER THE 1967 RANCH TRUST.
- IV. PLAINTIFFS FAILED TO MEET AND CARRY THEIR BURDEN OF PROOF.
- V. IN ALL REMAINING ASPECTS OF THIS APPEAL, THE APPELLANT, EXECUTOR ADOPTS THE POINTS AND ARGUMENTS OF THE APPELLANT FOUNDATION IN THIS PLEA BEFORE EQUITY TO UPSET AT THE BEHEST OF DECEDENT'S MASSACHUSETTS FAMILY THE TRUST FOR THE BENEFIT OF THE PEOPLE OF UTAH WHICH MR. C. COMSTOCK CLAYTON UNEQUIVOCALLY DESIRED TO IMPLEMENT.

### ARGUMENT

#### I.

THE COURT BELOW FAILED TO CONSIDER THE  
EQUITABLE DEFENSES RAISED BY APPELLANT,  
CALVIN A. BEHLE, EXECUTOR

The court below, even though the question was presented in the context of a motion for a jury trial and objections thereto, failed to make a definitive ruling as to whether this action was one in equity or in law. However, the fact that this is an action in equity clearly appears on the face of the original complaint filed by the six original plaintiffs who ask for declaratory relief

to have the defendant-Executor and the defendants-Trustees hold the shares of Clayton-Macfarlane Company stock, currently held by them, as trustees for plaintiffs. An action for declaratory relief is an equitable action. McDonald v. Midland Mining Co., 293 P.2d 911 (D.C.App. Cal. 1965). And as stated in Tibbitts v. Fife, 328 P.2d 212, 214 (D.C.App. Cal. 1958), "Equity retains exclusive jurisdiction of actions to establish and enforce trusts."

Since this is so clearly an action in equity, there can be no doubt about the fact that all of the long established maxims of equity apply to it. Two of said maxims are of particular importance in this case. The first has been stated as "He who comes into equity must come with clean hands." The second, which is sometimes said to include the first, has been stated as "Equity aids the vigilant, not those who sleep on their rights," and is commonly known as the doctrine of "laches."

There can be little doubt that the judge below failed to consider these defenses. In a Motion to Amend Defendant's Answer, filed on March 26, 1976, defendants asked that they be allowed to amend the pleadings, and particularly their Answer, to conform to the evidence introduced at trial, by including the equitable defenses of "lack of clean hands" and "laches." The judge denied said motion stating that it had not been timely filed. (R. 968, 970). This alone contravenes the law as set forth in Rule 15(b), Utah Rules of Civil Procedure, which states that a motion to amend the pleadings to conform to the evidence "...may be made upon motion of any party at any time, even after judgment...."

Rule 8(c), Utah Rules of Civil Procedure, requires that certain defenses including "laches" be pleaded as an affirmative defense but the defense of "unclean hands" is not included in said rule. However, Rule 8(c) is not independent of the other Rules of Civil Procedure and must not be applied to defeat their fundamental purpose. Thus, the Supreme Court of Utah has said,

"It is true, as plaintiff insists, that Rule 8(c) U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required."  
Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, 91 (1963).

That plaintiffs had notice of the issues of laches and unclean hands cannot be doubted. Plaintiffs were initially put on notice verbally at a hearing held before the court on October 30, 1975 when the judge was considering a request for a jury trial and whether or not this case was a case in equity. Plaintiffs were further and more clearly advised of these particular issues during the trial of this action when it became apparent to all that Calvin W. Clayton, Sr. had engaged in the actions, described hereafter, which give rise to these equitable defenses. And, if any doubt still existed in the minds of plaintiffs as to the reliance of defendants upon these equitable defenses, defendants' Trial Brief,

filed pursuant to the order of the court at the conclusion of the trial of this matter, would have extinguished any doubt. In Point IV of said Brief, entitled "Plaintiffs' Claimed Relief is Inequitable," plaintiffs are put on notice of defendants' reliance upon equitable defenses, particularly that of the "clean hands doctrine." Thus, it is clear that plaintiffs were on notice and certainly had the opportunity at trial as well as in subsequent proceedings to meet these issues, which is all that is required under the law.

A. Clean Hands

The maxim that "He who comes into equity must come with clean hands" is a basic and fundamental precept of equity jurisprudence. Park v. Jameson, 12 Utah 2d 141, 364 P.2d 1 (1961); 27 AmJur 2d, Equity, §136, p.666; 4 A.L.R. 44; 30 C.J.S., Equity, §93, p.1008. Stated simply it requires that anyone seeking enforcement of any claim in equity must come to the bar of the court of equity without inequitable conduct on his part. Otherwise the court will refuse to lend its aid to his claim. This maxim has been more specifically defined as follows:

"The meaning of the maxim is that a party to a suit in equity, in order to obtain the relief sought, must not have been guilty of reprehensible conduct directly connected with the matter in controversy, and that any litigant who is at fault in this respect will not receive the aid of a court of equity in the protection of any rights which he may claim relating to the matter of the suit." 4 ALR 44, 47.

"It means that whenever a party who seeks to set the judicial machinery in motion and obtain some equity remedy has violated conscience or good faith, or other equitable principle in his prior conduct with reference to the subject in issue, the doors of equity will be shut against him notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief." 27 AmJur 2d, Equity, §137, p.670.

"It means that equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief." 30 C.J.S. Equity, §93, p.1009.

Case law in virtually all jurisdictions reflects similar definitions of the maxim, and the Utah Supreme Court has said, "A court of equity is a court of conscience, and anyone appealing to or asking the aid of such court should come into it with clean hands and be willing to do equity." Shell Oil Co., v. Steffler, 87 Utah 176 48 P.2d 503, 509 (1935); Swanson v. Sims, 51 Utah 485, 496, 170 P.2d 774 (1918).

As indicated above, this is an equitable action since the plaintiffs seek declaratory relief by asking the court to require the defendants to hold certain property in trust for them. Thus, the clean hands doctrine, a fundamental maxim in equity, should have been considered by the Court.

While this maxim was not specifically raised as a defense in the defendants' Answer to plaintiffs' complaint, it should nevertheless have been considered by the judge below since, as indicated above, both the judge and the plaintiffs had adequate notice of defendants' reliance upon said defense and its application

to this case. Generally, it has been said that the "clean hands" maxim may be invoked by a party who has not pleaded it. 27 Am Jur 2d, Equity, §136, p.668; Dickerson v. Murfield, 147 P.2d 194 (S.Ct. Ore. 1944). As stated in 4 A.L.R. 44, 47:

"The maxim need not be pleaded, for when the evidence discloses the unconscionable character of a transaction, the court, whether the maxim is pleaded or not, will of its own motion apply the principle involved therein."

In other words, the maxim is applied to protect the public and the integrity of the court, 30 C.J.S. Equity, §93 p.1012, and where the facts presented to a Court of equity raise the question of a plaintiff's own misconduct in appearing to invoke the court's aid, the court of its own motion must consider the facts of plaintiff's case with regard to the cleanliness of his hands. Or, as stated in 30 C.J.S., Equity, §93, p.1013:

"Whether parties are within the application of the maxim is primarily a question of fact, and the court, on any suggestion that a plaintiff has not acted in good faith concerning matters on which he bases his suit, must inquire into the facts in that respect."

The facts, which form the background of this action, as they developed in discovery and at the trial, demonstrate the obvious reasons for which the clean hands doctrine should be applied to reject plaintiffs' claim. The record clearly reflects that in 1963 Calvin W. Clayton, Sr. entered into a trust agreement as co-trustee with his father, C. Comstock Clayton. This trust was funded by the 125 shares of Clayton-MacFarlane Company stock here in question which were owned by C. Comstock Clayton and donated by him to the



Trust. Four of the plaintiffs claim, as part of their action herein, that said trust was irrevocable since no express words of revocation were included. They further assert that the res of said Trust was converted by C. Comstock Clayton in breach of his fiduciary duties as trustee. Defendant Behle, as Executor, specifically denies that said res was converted by C. Comstock Clayton, in breach of his fiduciary duties, and adopts the brief of Appellant Foundations trustees with respect to revocability. Further, it is clear that decedent's son, Calvin W. Clayton, Sr. knew of the transfer of said res to C. Comstock Clayton, his father, and in fact actively participated in the transfer of the res as well as in setting up the Clayton Beneficiary Voting trust which he knew was at one time intended to be funded by the same res. This is affirmed by the testimony of Calvin W. Clayton, (Ab. 38 R. 239) and also by the fact that he, along with all five of the other plaintiffs herein, believed that the 1963 Clayton Family Trust had been revoked and therefore filed a creditor's claim with appellant Executor in reliance only on the 1967 Clayton Beneficiary Voting Trust. (Exhibit 32 below.)

Plaintiff, Calvin Sr., along with the other plaintiffs in this action, have asserted, in essence, that the revocation of the 1963 Trust was unlawful since the law of Massachusetts does not allow revocation of a trust where no specific language reserves said power. If this is the law of Massachusetts, which appellant Executor specifically denies, Calvin Sr. actively participated in an unlawful act with respect to said res in endorsing Certificate

Number 26 for transfer to C. Comstock Clayton and in acting as a trustee for the Clayton Beneficiary Voting Trust which was, as Calvin knew, to be funded by the same res.

Calvin's conduct clearly flies in the face of the following definition from 27 Am Jur 2d, Equity, §137, p.669:

"'Clean hands' is a legal euphemism which refers to the acceptability, cleanliness, and decency of the claim put forth."

His conduct more closely relates to this definition from the same source:

"Within the purview of the maxim, the hands of the litigant are rendered unclean by conduct which is 'condemned and pronounced wrongful by honest and fair minded men.'" 27 Am Jur 2d, Equity, §138, p.672.

and was described as follows in Seal v. Seal, 212 Kan. 55, 510 p.2d 167, 173 (Kan. 1973):

"That status (of having unclean hands) is acquired by 'willful conduct which is fraudulent, illegal, or unconscionable.' (Parentheses and emphasis ours).

Furthermore, that the court below should have denied relief to Calvin, Sr. based on his conduct is supported by the following:

"Relief will be denied where it appears that the right upon which the complainant relies has grown out of a wrong, a breach of duty, or a violation of law.... Furthermore, a party will not be relieved from the consequences of his own fraud or wrong or be given the aid of equity to right his own wrong." (Emphasis added) 27 Am Jur 2d, Equity, §138, pp.672, 674.

"'Any really unconscientious conduct connected with the controversy, to which he is a party, will repel him from the forum whose very foundation is good conscience.' 1 Pomeroy, Equity Jurisprudence §404. \*\*\* But where conduct, in addition to being unconscionable, is also illegal, a court of equity will, of course, refuse its aid to any person or persons guilty thereof." 4 A.L.R. 63 (Emphasis ours).

Or, as stated in Weegham v. Killefer, 215 Fed. 171 (1914):

"Under this maxim any willful act in regard to the matter in litigation which would be condemned and pronounced wrongful by honest and fairminded men will be sufficient to make the hands of the applicant unclean. Both courts and text writers have repeatedly spoken upon this subject in no uncertain language.... He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness, will appeal in vain to a court of conscience, even though in his wrongdoings he may have kept himself strictly 'within the law'."

While Calvin W. Clayton, Sr.'s conduct is obviously of such a nature as to preclude him from relief in equity, his conduct and its unconscionability are compounded by the involvement and activities of Mario Ciullo with respect to said trusts. Mr. Ciullo admits that he is personally interested in the outcome of this action. (Ab.11 R.64). Mr. Ciullo further testified at trial that he considered himself an expert in the law of trusts in Massachusetts and was accepted by the court below as just such an expert. (Ab5R.28).

It is clear from the record that Mr. Ciullo was the scrivener of several trusts involving C. Comstock Clayton as donor and trustee and Calvin W. Clayton, Sr. or himself as co-trustee, including the Clayton Family Trust, the Clayton Beneficiary Voting Trust, and the C. Comstock Clayton Trust. Thus, Ciullo, the trust expert, participated in what has been described by the plaintiffs as the conversion of the trust res from the Clayton Family Trust. His only reservation in doing so, apparently was his statement to C. Comstock Clayton, as part of his letter outlining what needed to be done to activate the Clayton Beneficiary Voting Trust and

to transfer the stock in said Trust, that the trust certificate should be kept in Utah because of "possible legal complications" in Massachusetts. The fact that Mr. Ciullo failed clearly to inform his client, Mr. Clayton, that such a transfer was, as he and the plaintiffs now assert, against the law, and the fact that Ciullo actively participated in preparing the documents which led to what plaintiffs call Mr. Clayton's conversion, all indicate that other unclean hands besides Calvin W. Clayton, Sr.'s were at work.

The record makes it clear that the other beneficiaries under the 1963 Clayton Family Trust did not directly participate in the revocation of or expressly waive their interests in the 1963 Trust. However, such specific participation or waiver is not always a requirement to show a lack of clean hands on the part of such beneficiaries particularly where they by virtue of their family relationship are in privity with their father as a beneficiary. Thus, it has been said:

"It has been pronounced that where a plaintiff comes into equity for relief, he and those in privity with him must be free of any inequitable conduct relative to the controversy. It has been held that although all members of a group suing as plaintiffs are not guilty of unconscionable conduct, they cannot claim the benefit of a fraud perpetrated by one or two of their number. If the maxim is applicable to the conduct of the individual, relief will be denied to his heirs or personal representative." 27 Am Jur 2d, Equity, §136, p.667.

The conclusion to be drawn with respect to the application of the "clean hands" doctrine to the fact of this case is that Calvin W. Clayton, Sr., aided by an attorney who served both himself and his father and who still serves Calvin, participated in what

Calvin himself has described as a wrongful and illegal conversion of the 125 shares of stock in question here. In spite of his participation in these actions, he now comes to a court of equity seeking to avoid the consequences of his illegal conduct and to take advantage of a trust which he helped to revoke. To allow his claim would be unconscionable and in derogation of the court's duty to avoid aiding a wrongdoer. At the very least the court below should have denied any claim by Calvin W. Clayton, Sr. to the stock in question here. However, the taint of Calvin's unclean hands likewise appears on the hands of his sons, the other beneficiaries under the 1963 Trust. Calvin, who was clearly in privity with them and who might be described as their agent or guardian, through his partnership in what all plaintiffs claim was wrongful and illegal conduct, makes it unconscionable for them now to claim the benefit of the 1963 Trust.

B. Laches.

The doctrine of laches has been defined in various ways including the following:

"Laches is a purely equitable doctrine which is frequently termed the 'doctrine of stale demand.' The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking relief. 'Laches' has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, as will operate in a bar in equity." 27 Am Jur 2d, Equity, §152, p.687.

As indicated by this quotation, laches is an equitable doctrine. While equity courts had no specific statute of limitations because such were statutory only, they frequently relied

upon the doctrine of laches to refuse relief where there had been an unreasonable and unexplained delay in prosecuting a claim. Equity, George L. Clark, 1954. Courts of equity still apply the doctrine of laches where warranted. Thus, the United States Supreme Court has said:

"...there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."  
Badger v. Badger, 2 Wall. 87, 94, 17 L.Ed 836 (1864).

As earlier indicated, the doctrine of laches is closely akin to and based upon maxims of equity similar to those supporting the "clean hands" doctrine. Thus, it has been said:

"Laches is founded principally upon the equitable maxims, 'he who seeks equity must do equity,' 'he who comes into equity must come with clean hands,' and 'equity aids the vigilant, not those who sleep on their rights.' The basis of the doctrine of laches is said to be public policy, which requires, for the peace of society, the discouragement of stale demands." 27 Am Jur 2d, Equity, §153, p.689.

As a general rule it may be said that the beneficiary of a trust may be precluded from recovery in any action for relief based upon the trust of which he is a beneficiary where all of the elements supporting the doctrine of laches appear. Thus, it has been said:

"Laches of the beneficiary. A beneficiary may be barred by his laches from holding the trustee liable for a breach of trust. He is so barred if he fails to sue the trustee for the breach of trust

for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable. Among the circumstances which are of importance are the length of time during which the beneficiary has delayed in bringing a proceeding against the trustee; the change of circumstances, if any, between the commission of the breach of trust and the bringing of the proceeding, such as the death of witnesses or parties, or a change of position by the trustees. The notion of the barring of suit because of laches is the general idea that it is in accordance with public policy that suits should be brought with reasonable promptness. There is also the idea that after the lapse of a long period of time, it is difficult to ascertain the truth. There is also the idea of hardship to the defendant in pressing stale claims against him, although the hardship to him may be outweighed by the hardship to the plaintiff in denying him redress." Scott on Trusts, §219, p.1755. See also, Restatement 2d, Trusts, §219, p.511; Lulay v. Lulay, 429 P.2d 802, (S.Ct.Ore. 1967).

Time is an important factor to consider in determining whether laches applies to a particular case. Thus, it has been said, "lapse of time is an important, indeed, an essential element of laches." 30A C.J.S., Equity, §116, p.45. However, time alone is not the only factor which is important to the doctrine of laches. Unlike statutes of limitations which are triggered by the passage of time alone, laches requires more. As stated in 27 Am Jur 2d, Equity, §163, p.703:

"Laches is not, as is a statutory period of limitations, a mere matter of elapsed time, but is principally a question of the inequity of permitting the claim to be enforced--an inequity founded upon some change in the conditions or relations of the property or the parties."

## II.

THE ACTIONS OF PLAINTIFFS WOULD MAKE  
IT INEQUITABLE TO GRANT THEM RELIEF  
AND THE DOCTRINE OF LACHES SHOULD BE  
APPLIED TO DENY THEIR CLAIMS

There can be no doubt that the doctrine of laches should be applied in this case to preclude plaintiffs' recovery since the two elements required to invoke laches are present. First, there has been an extended period of time between the time at which the cause of action arose and the time when plaintiffs brought this action. Second, other factors clearly indicate that recovery by plaintiffs, at this late date, would produce inequitable results.

In a case similar in many respects to the one at issue here, the Supreme Judicial Court of Massachusetts affirmed a demurrer based upon laches which was granted by a lower court against a petitioner who alleged an oral trust and sought the proceeds thereof. The petitioner's deceased uncle was said to have received an assignment of property to secure a \$5,000 debt owed him by his nephew. The uncle received a large excess over and above the \$5,000 and, though requested by the plaintiff to make an accounting, the uncle refused to do so and said he would hold the excess in trust for petitioner's wife and child. The petitioner alleged that his failure to file any cause of action was due to his subserviency to his uncle and his reliance upon his uncle's promise to hold the property for petitioner's wife and child. The Court cited the long delay and the death of the trustee "whose testimony must have been material" and said:



"But where the trustee has repudiated his obligations as trustee and holds adversely, a beneficiary with knowledge of the repudiation can no longer rely upon the trustee's continued performance of his duty. The beneficiary is then in a position similar to that of any other party who has an equitable claim against an adversary and may become barred by laches if he fails to proceed with reasonable diligence." Chandler v. Lally, 31 N.E.2d 1, (S.Jud.Ct. Mass. 1941).

This case, decided under Massachusetts law with which plaintiffs and their attorney, Mr. Ciullo, should have been familiar, is dispositive of the case now before the court. The only excuse raised by Calvin W. Clayton, Sr. for his delay in bringing any action or for his action in revoking the Clayton Family Trust was his subserviency to his father and his belief that his father could do what he wanted because it was his property. (R.249, 250.) On the other hand, Calvin knew that the Clayton Family Trust was irrevocable because Mario Ciullo told him so (Ab.3 R.14) yet Calvin actively participated to revoke said trust.

The time period during which a plaintiff has delayed in asserting his rights is to be measured from the date of the injury. Or as stated in 30A C.J.S., Equity, §116, p.59:

"In ascertaining whether relief should be refused because of laches, lapse of time should generally be considered as running from the date when the alleged legal injury occurred."

As stated in their Complaint, (R.442) and their Amended Complaint (R.551), the plaintiffs in this case allege to have been injured when,

"On or about June 9, 1967, C. Comstock Clayton in breach of his fiduciary duties and without the knowledge or consent of Calvin W. Clayton, Sr., the other trustee, or any of the beneficiaries of the Clayton Family Trust did wrongfully and fraudulently withdraw and convert to his own use said 125 shares of Clayton-MacFarlane Company capital stock from the said Clayton Family Trust and had said shares of stock transferred and delivered to himself, individually, as C. Comstock Clayton."

Thus, it would appear that the period of delay began on June 9, 1967 and ended when plaintiffs filed their complaint on December 28, 1971. This four and one-half year delay evidences a disregard of plaintiffs' claimed right to assert a claim against C. Comstock Clayton for the alleged breach of trust and their responsibility to do so.

The equitable doctrine of laches is not so strict as to disregard plaintiffs' delay when it has been brought about by ignorance, incapacity or other excusable factors.

Thus, it has been said that, "In order for laches to be a valid defense, it is held that the delay must be unexplained and inexcusable." 27 Am Jur 2d, Equity, §164, p.705. Plaintiff must have known or had the opportunity to find out about the alleged injury and to assert his rights with respect thereto, and then done nothing about it. See 27 Am Jur 2d, Equity, §167 p.710. That this principal is applicable in Utah and with respect to beneficiaries who claim that their rights under a trust have been abused was made clear by this Court in Acott v. Tomlinson, 9 Utah 2d, 337 P.2d 720, 724 (1959), where it said:

"Contributory negligence or even stupidity on the part of the beneficiary of a trust in not discovering his rights are being abused is not a basis for the application of laches.... That defense is only available against a beneficiary who knows, or the circumstances are such that he must be charged with knowledge of the trustee's breach, or of his repudiation of the trust, and who so long delays in bringing suit that it would be inequitable to hold the trustee." See also Walker v. Walker, 17 Utah 2d 53, 404 P.2d 253 (1965); Child v. Child, 8 Utah 2d 261, 332 P.2d 981 (1958); Berniker v. Berniker, 174 p.2d 668 (D.C. App. Cal. 1947); Davies v. Metropolitan Life Insurance Company, 63 P.2d 529 (Wash. 1937); McCallum v. Anderson, 147 F.2d 811, (10th Cir. 1945); Restatement 2d, Trusts, §219, p.513.

In spite of the assertion in plaintiffs' Amended Complaint that C. Comstock Clayton transferred the 125 shares of Clayton-Macfarlane Company stock without their knowledge, the record fails to support this Calvin W. Clayton, Sr. unequivocally stated on the witness stand that he signed the certificate of stock issued to the Clayton Family Trust in order to transfer it to the Clayton Beneficiary Voting Trust and that he executed the Voting Trust having full knowledge of its provisions and their affect on his interests. (Ab. 38 R. 239). And Mario Ciullo stated that he had advised Calvin that the Clayton Family Trust was irrevocable. (Ab. 3 R. 14). There can be no doubt therefore that not only was Calvin aware of the repudiation of the Clayton Family Trust, of which he now complains, but he participated as a trustee in said repudiation in spite of the fact that his attorney had advised him that said trust was irrevocable.

Therefore, the conclusion which must be reached is that since Calvin knew of and participated in the revocation of the Clayton Family Trust, which he had been advised was illegal, he knew or was on notice to find out about such a repudiation and the time for him to assert his rights accrued when he knew that Comstock had signed or was prepared to sign the stock certificate and the Clayton Beneficiary Voting Trust.

While the record appears to indicate that Calvin's three sons as the other beneficiaries of the Clayton Family Trust had no clear knowledge at least until 1970 of its existence or the repudiation in favor of the Clayton Beneficiary Voting Trust, there is authority which suggests that Calvin's knowledge may be imputed to his children and that the time during which no action has been taken will apply to them as well. Thus, it is said:

"It has been held on the one hand that where time has begun to run against the ancestor, it continues to run against the heir, although the latter is an infant or feme covert, ...." 30 C.J.S., Equity, §128, p.75.

"Since a party is generally charged with the laches of his privies...or agents, ...it follows that knowledge of an ancestor will be imputed to an heir, ...." Id., p.86.

This position is supported also by Rule 17(a), Utah Rules of Civil Procedure, which vests in the trustee of a trust any right of action for wrongs against trust property. In a recent

case in Idaho, Jones v. State, 432 P.2d 420, (S.Ct. Id. 1967), the Supreme Court of that state held that where the trustee of a trust involving a sale of real property in breach of trust failed to act within the time required under the statute of limitations, the minor beneficiaries of the trust were precluded by said statute of limitations from suit for their interests against those who purchased the property from those gaining title through adverse possession.

In addition to a showing of a lapse of time, other factors are important in determining whether plaintiffs' laches will preclude recovery. As indicated above, plaintiff's delay in asserting his rights must be excusable in order to allow him to escape application of the laches doctrine. However, only such factors as age, competency, or lack of knowledge have been allowed to show excusable neglect. In the case at issue here, Calvin W. Clayton, Sr., lacks any excuse for his laches. Obviously, his age and competency were adequate and as pointed out above, he not only had knowledge of his father's repudiation of the Clayton Family Trust, but he was a willing participant in spite of legal advice that his action was illegal. And as indicated above, his actions may be imputed to his children. 30A C.J.S., Equity, §115, p.44 lists other factors to be considered in determining, in any particular case, whether there are laches:

"Other matters to be considered...include the duration of the delay in asserting the claim, the sufficiency of the excuse offered in extenuation of the delay, whether plaintiff acquiesced in the assertion or operation of the corresponding adverse claim, whether the evidence of the matters in dispute has been lost or become obscured, whether the conditions have so changed as to render the enforcement of the right inequitable, whether third persons have acquired intervening rights, the nature of the duty or obligation sought to be enforced, and whether plaintiff or defendant was in possession of the property in suit during the delay."

The duration of the delay and the sufficiency of the excuse offered having already been considered, further discussion is not necessary except to say that upon showing evidence of said factors, any of several presumptions may arise in favor of defendant as described in 30A C.J.S., Equity, §116, p.60:

"Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that, if plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; ...or a presumption that the evidence of the transaction in issue has been lost or become obscured, ...or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim."

The question of "whether plaintiff acquiesced in the assertion or operation" of the Clayton Beneficiary Voting Trust is clearly answered by the claim made by all plaintiffs in their Complaint, Amended Complaint and Claim of Creditors filed with the Executor, Behle. In all of these documents, plaintiffs assert their rights to the stock in issue based upon the validity of the 1967 Clayton Beneficiary Voting Trust. Thus, they accepted the

alleged breach of which they now complain and relied upon it to establish their rights under the 1967 trust.

That this is a proper element to consider with respect to laches is made clear by the following:

"Acquiescence in an adverse right is an important element of laches. Where plaintiff has acquiesced for an unreasonable length of time in the assertion or operation of a right adverse to his own, equity will not enforce his claim." 30A C.J.S., Equity, §117, p.63.

The death of C. Comstock Clayton in early 1971 and the vague recollection of certain important events in the minds of parties and important witnesses underline another factor which must be weighed in the balance to determine whether plaintiffs should be precluded in their claim because of their laches. Thus, it has been said:

"A court of equity may refuse relief after inexcusable delay because of the difficulty, if not the impossibility, of arriving at a safe and certain conclusion as to the truth of the matters in controversy and doing justice between the parties, where the evidence has been lost or become obscured through the loss of documents, or through death or disappearance of one or more of the participants in the transaction in suit or of the witnesses thereto, or through impairment of the memory of participants or witnesses still living." 30A C.J.S., Equity, §118, p.69.

There can be no doubt that if C. Comstock Clayton were alive today any question respecting his intent or his understanding of the law concerning the trusts in question would be easily established. Further, any vagueness in the recollection of witnesses or parties as to their statements to C. Comstock Clayton or his intent would be clarified. However, with the death of Mr. Clayton,

important testimony and guidance in gathering evidence and establishing a defense has been lost to the defendants. As the Supreme Court of Hawaii said:

"In an action against a trustee for breach of trust, death of a material witness during the period that a beneficiary has delayed in bringing his action is an important circumstance to be considered in determining whether the beneficiary is guilty of laches." Brown v. Bishop Trust Company, 355 P.2d 179 (1960).

Another factor which must be considered is whether third persons have acquired intervening rights. If such is the case and if by enforcing the plaintiffs' claim such rights would be injured, a court of equity will refuse to grant relief. As stated in 30A C.J.S., Equity, §118, p.68:

"A court of equity will refuse to act where, in the course of an inexcusable delay, third persons have acquired rights in the subject matter of the controversy which would be injuriously affected by the granting of relief."

The style of this case indicates that Geraldine V. Griffiths is seeking recovery under the 1967 Clayton Beneficiary Voting Trust and the trustee defendants represent a charitable foundation created by C. Comstock Clayton to support, among other things, the arts in Utah. Thus, Geraldine Griffiths as well as all people interested in the advancement of the arts in Utah have acquired intervening interests in the subject of this lawsuit which is the res of the Clayton Family Trust and all would be prejudiced through no fault of theirs by a finding which would allow plaintiffs to recover the stock in question.



Closely associated with the question of intervening rights is the question of "whether conditions have so changed as to render the enforcement of this right inequitable." That this consideration is important is indicated by language from 30A C.J.S., Equity, §118, p.65, where it is stated:

"Injury or prejudice resulting from the granting of relief to the adverse party is an important element of laches; and where prejudicial changes in conditions have occurred during plaintiff's delay in asserting his right, it will be barred for laches."

Obviously the arts in Utah in which Mr. Clayton was keenly interested will be advanced and aided by the use of the stock in question and enforcement of plaintiffs' claim would be prejudicial to the recipients of Foundation aid. While this, in and of itself, is important to consider, an equally important consideration is that the entire estate plan of C. Comstock Clayton would be set aside by granting plaintiffs' requested relief.

In the first place, it is clear from the various documents in evidence and from the trial transcript that during his lifetime C. Comstock Clayton had in mind benefitting his only living child, Calvin, his grandsons, Bruce, Calvin and Charles, his granddaughter, Geraldine, Calvin's wife, Winifred, and the arts. Thus, while in the Clayton Family Trust he had provided only for Calvin and his sons, in the Clayton Beneficiary Voting Trust, after Calvin and his wife, Winifred, were at odds, Comstock provided for Winifred separately and also included Geraldine who had been left out of the Family Trust. That his desire was to provide for these two beneficiaries is clear by his insistence that they be included in

the C. Comstock Clayton Trust which was drafted at approximately the same time as the Clayton Beneficiary Voting Trust. This insistence is pointed out by his letter to Mario Ciullo dated May 20, 1969 (Exhibit 10 below) in which he indicates his willingness to execute the C. Comstock Clayton Trust if and when these two beneficiaries are added.

The fact that Mr. Clayton was concerned and interested in the Arts in Utah appears not only from the fact that he set up the C. Comstock Clayton Foundation for this purpose, but also from the fact that he made said Foundation the residuary beneficiary under his Will in which he included as beneficiaries all of the plaintiffs herein as well as others.

Another aspect of the change in conditions since the date of the Clayton Family Trust is the fact that all of the plaintiffs herein have been provided for through the C. Comstock Clayton Trust and the Will of Mr. Clayton in amounts equal to or in excess of that which they could claim as beneficiaries of the Clayton Family Trust. Thus, pursuant to the terms of the C. Comstock Clayton Trust (a Trust funded with a \$360,000 subordinated loan), after the life estate of C. Comstock Clayton, Calvin W. Clayton, Sr., and Geraldine V. Robertson (now Griffiths) share a life estate. At the death of Calvin W. Clayton, Sr., his wife, Winifred, will receive his share for life and at the death of Calvin W. Clayton, Sr. and Winifred, their issue are to receive their share in per stirpes shares. At the death of Geraldine, her issue will receive her share in per stirpes shares. And under the terms of C. Comstock

Clayton's Last Will and Testament, the parties herein have received in cash or the equivalent thereof the following:

Geraldine V. Robertson (now Griffiths) -- All personal property plus \$25,000

Winifred U. Clayton -- \$10,000

Charles Comstock Clayton II -- \$25,000

Bruce Underwood Clayton -- \$25,000

Calvin Whitney Clayton -- \$25,000

Calvin Whitney Clayton, Sr. -- \$80,614

C. Comstock Clayton Foundation -- residue

These changes made by C. Comstock Clayton with respect to his estate planning, bringing into the picture his granddaughter and his daughter-in-law as well as the Clayton Foundation Trust, have so radically changed the conditions which prevailed in 1963 at the time the Clayton Family Trust was set up, that it would be grossly inequitable to enforce plaintiffs' claims in derogation of the clearly intended estate planning of Mr. Clayton. Such would result in unjust enrichment of these particular four plaintiffs, Calvin W. Clayton, Sr. and his three sons, by allowing them to receive twice what C. Comstock Clayton obviously planned to give only once to them and would exclude the fourth grandchild, Geraldine, and Calvin W. Clayton, Sr.'s estranged wife, Winifred. And while this Court has found that it would be unfair to apply the doctrine of laches to deprive a plaintiff of the benefits of his planning, Child v. Child, supra., so it would be unfair to impress a trust

upon the stock in question here to deprive C. Comstock Clayton of his planning. As the Court said in Child, "He who plants the crop should reap the harvest;" or in this case, "He who earned the estate and directs its distribution should not be frustrated in his efforts without good reason." Again at the very least the court below should have denied any claim made by Calvin W. Clayton, Sr. since he knew of and participated in the repudiation of the Clayton Family Trust and yet waited four and one-half years and until his father was dead to complain of it.

### III.

CALVIN CLAYTON, SR. AND HIS SONS SHOULD HAVE FILED  
A PROPER CLAIM WITH THE EXECUTOR UNDER THE 1963  
RANCH TRUST, AS THEY DID TOGETHER WITH THEIR  
MOTHER AND COUSIN UNDER THE 1967 RANCH TRUST

Section 75-9-4 is the legislators' mandate in probate proceedings that "All claims arising upon contract, whether the same are due, not due or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever."

Plaintiffs, all six of them, timely filed in 1971 such a claim with the Executor, seeking under the 1967 contract with decedent creating the Clayton Beneficiary Voting Trust to obtain equitable relief by way of impressing a constructive trust on the Ranch stock. When in June the Executor under all the circumstances denied this claim and put plaintiffs to their proof, this suit under Section 75-9-9 was timely filed by all six in December of that year, including recitals of submission of the claim to the Executor, and its denial. Section 75-9-11 explicitly provides that "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor...."

In 1971 when the six plaintiffs filed their claim with the Executor and brought this suit, Calvin Sr., unequivocally stated all along that he had read it "page by page" in 1963, and some of Calvin's sons and their attorney, Ciullo, knew of the 1963 Trust. Together at that time they all six elected to make no claim under the 1963 contract. Instead, together they elected to claim only under that of 1967. Not until April of 1973 when the facts developed that the 1967 Trust had never been "activated" or funded, did Calvin and his three sons bring out the new, but really old, claim arising out of the 1963 contract with the Decedent.

In the meantime, Executor had relied upon the filing of the claim arising out of the 1967 contract.

In the old case of Hamilton v. Dooley, 15 Utah 280, 49 P. 769 (1897), this Court pointed out the difference between a creditor seeking to recover an ordinary debt against the estate, and one who is asserting an equitable claim or interest in property in the executor's hands. This rule may very well apply here, and plaintiffs may have needlessly filed the claim under the 1967 contract under an erroneous impression, despite the statute, that such was a condition precedent to filing this action.

An executor of course is under strict limitations as to claims, and the point here is that while this Court might very well determine the law to be that no claim had to be filed with the executor in this case, as the Court below held, still this emphasizes that plaintiffs coming to the bar of equity to seek

relief are not entitled to such relief under the 1963 Trust when in 1971 they were all very well aware that the 1963 Trust had been revoked in fact by their benefactor in lieu of other compensatory benefits which he had granted them and they had accepted in lieu of the 1963 Trust; and when Calvin Clayton, Sr., the co-trustee and Ciullo and Macfarlane, Mr. Clayton's attorneys, had actively participated in such revocation. And to the extent that the three sons understandably might not have known of the 1963 Ranch Trust as their father did, at the time of its creation, or of its revocation in 1967, by 1971 as adults they concurred in the revocation when they elected to claim only under the 1967 Ranch Trust and also accepted under the 1967 Charles Comstock Clayton Trust, as well as the Will.

It should be noted that Winifred would not participate in such conniving, for when she learned that the 1967 Ranch Trust apparently had never been activated, and that in lieu of the old 1967 trust her father-in-law had set up both the Will and the Charles Comstock Clayton Trust in which she would participate, she would not further participate in an action to frustrate her benefactor's intent.

Not only is Decedent's clear intent frustrated by the decision below and the claims still made for equitable relief in this Court, but the Estate and Foundation which he left have been badly impaired by the consequences of the revival of the revoked 1963 trust, which plaintiffs had helped, and knew had been, revoked,

#### IV.

#### PLAINTIFFS HAVE FAILED TO MEET AND CARRY THEIR BURDEN OF ESTABLISHING THE VALIDITY OF THE CLAYTON FAMILY TRUST BY CLEAR AND CONVINCING EVIDENCE

Normally, in civil actions, the burden of proof in a matter rests upon the party who asserts the affirmative of an issue. Thus, it has been said:

"The burden of proof in the strict sense of the term, that is, the ultimate burden of establishing the truth of a given proposition of fact essential to a cause of action or defense, rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of the issue, ...." 29 AmJur2d, Evidence, §127, p.159.

This burden is the same in equity as at law. Or as stated in 30A C.J.S., Equity, §477, p.497:

"There is no difference with respect to the burden of proof between proceedings at law and in equity; in both, the party maintaining the affirmative of the issue has it cast on him. The burden is on the complainant to establish the truth of the material and controverted allegations on which he bases his right to relief, notwithstanding the fact that the bill waives an answer under oath."

And, particularly with respect to trusts, the burden is upon he who would establish a trust to prove by clear and convincing evidence that such a trust exists and is valid. Or as the Supreme Court of Montana has said:

"The burden of proof to establish the existence of a trust...is upon the party who claims it. Trusts must be founded on evidence which is unmistakable, clear, satisfactory and convincing." First National Bank of Twin Bridges v. Sant, 161 Mont. 376, 506 P.2d 835, 841 (1973).

It is clear from the record in the action before this Court that plaintiffs have failed to meet and carry their burden. The reliance in their Complaint and Amended Complaint upon both the 1963 and 1967 Trusts casts the first shadow of ambiguity over their proof. This shadow was compounded when the light of truth became obscured by the death of C. Comstock Clayton, the only competent witness to speak of the matters here in question. The apparent changes in Comstock Clayton's estate planning could only be verified by his own testimony. The vague recollections of happenings in 1963 and 1967 by the witnesses before the court add to the shadows. And finally the entire matter is blackened by the apparent dealings of one of the principal beneficiaries of the trusts in question and the Massachusetts attorney who drafted all of the trust instruments before the Court and who failed to give clear advice as to their effect.

So, far from being clear and convincing, the evidence adduced by the plaintiffs is rendered unclear by all of the testimony and exhibits produced by plaintiffs. The lack of clarity thus produced certainly falls short of what might be called "convincing" evidence.



V.

IN ALL REMAINING ASPECTS OF THIS APPEAL, THE EXECUTOR ADOPTS THE POINTS AND ARGUMENTS OF THE APPELLANT FOUNDATION IN THIS PLEA BEFORE EQUITY TO UPSET AT THE BEHEST OF DECEDENT'S MASSACHUSETTS FAMILY THE TRUST FOR THE BENEFIT OF THE PEOPLE OF UTAH WHICH MR. CLAYTON SO UN-EQUIVOCALLY DESIRED TO IMPLEMENT.

CONCLUSION

Appellant Executor adopts the argument of Appellants Trustees that the 1963 Clayton Family Trust was properly revoked by C. Comstock Clayton. While this, in and of itself, should have been enough to preclude plaintiffs from the recovery allowed by the lower court, the conclusion is inescapable that the equities of this case must bar the plaintiffs from said recovery. Since Equity will not countenance wrongdoing or aid a wrongdoer in obtaining the benefit of his wrongful acts, the court below clearly erred when, in spite of clear indications of the illegal and unconscionable conduct of beneficiaries and others closely associated with the trust in question, it permitted the distortion and destruction of C. Comstock Clayton's estate planning by the unjust enrichment of beneficiaries for whom he had otherwise provided.

DATED this \_\_\_\_\_ day of November, 1976.

Respectfully submitted,

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JAMES B. LEE

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JOSEPH W. ANDERSON  
of and for  
PARSONS, BEHLE & LATIMER  
Attorneys for Appellant

EXHIBIT A

TABLE OF KEY DATES AND EVENTS

10/22/63	<u>Clayton Family Trust</u> (CFT) executed, and funded (Stock Certificate No. 26).
5/16/67	Stock power to terminate CFT executed by C. Comstock Clayton (CCC) and Calvin W. Clayton.
6/9/67	Stock Certificate No. 26 transferred from CFT to CCC personally (Stock Certificate No. 39).
7/12/67	<u>Clayton Beneficiary Voting Trust</u> (CBVT) counterparts sent to CCC by Ciullo.
7/18/67	CCC executed <u>C. Comstock Clayton Trust</u> (CCCT).
7/20/67	CCC transferred Stock Certificate No. 39 to CBVT (Stock Certificate No. 40) delivered to him.
8/29/67	CCC acknowledged CBVT before Macfarlane.
6/1/68	<u>C. Comstock Clayton Foundation</u> (CCC Foundation) established and funded.
9/1/68	<u>Last Will and Testament</u> executed by CCC.
2/5/69	CCC transferred Stock Certificate No. 40 from CBVT back to himself (Stock Certificate No. 41).
5/20/69	CCC letter to Ciullo about redrafting and funding CCC Trust.
9/17/69	CCC transferred 100 shares of Stock Certificate No. 41 to CCC Foundation (Stock Certificate No. 43).
10/7-13/69	CCC Trust as redrafted was executed by CCC and Ciullo, co-trustees.
12/7/70	Ciullo phoned Macfarlane and Behle advising that the Ranch Stock was supposed to be in a Massachusetts Trust.
Dec. 1970	CCC Trust funded.
12/30/70	CCC advised Behle that Massachusetts Trust had never been activated
12/31/70	Codicil to Last Will executed.
2/14/71	Charles Comstock Clayton died.
June 1971	Claim filed with Executor under 1967 CBVT and denied.
12/23/71	Suit brought by the six beneficiaries of 1967 CBVT
Apr. 1973	Amended Complaint filed alternatively claiming under 1963 CFT

## EXHIBIT B

TABLE OF CLAYTON - MACFARLANE SHARES HISTORY

NAME OF OWNER	DATE OF EXECUTION OF TRUSTS	STOCK CERTIFICATE NO.	DATE OF ISSUANCE OF CERTIFICATE	DATE OF CANCEL- LATION	NEW OWNER and CERTIFICATE NO.
CLAYTON FAMILY TRUST	October 22, 1963	No. 26 (125 shares)	November 1, 1963	June 9, 1967	C. Comstock Claytor Certificate No. 39
C. COMSTOCK CLAYTON (Individual)		No. 39 (125 shares)	June 9, 1967	July 20, 1967	Beneficiary Voting Trust - Certificate No. 40
BENEFICIARY VOTING TRUST	July 20, 1967	No. 40 (125 shares)	July 20, 1967	February 5, 1969	C. Comstock Clayton Certificate No. 41
C. COMSTOCK CLAYTON (Individual)		No. 41 (125 shares)	Feb. 5, 1969	Sept. 17, 1969	25 shares/C. Comsto Clayton, Cert. No. and Clayton Foundat 100 shares - Certif: No. 44
C. COMSTOCK CLAYTON FOUNDATION		No. 43 (100 shares)	Sept. 17, 1969	Delivered to Trustees	-----
C. COMSTOCK CLAYTON (Individual)		No. 42 (25 shares)	Sept. 17, 1969	In Decedent's Estate Assets	-----

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Appellant's Brief was duly mailed, postage prepaid, to Rex J. Hanson and James L. Sadler, Hanson, Wadsworth & Russon, Attorneys for Appellees, Kearns Building, Salt Lake City, Utah 84101; James W. Beless, Jr., Attorney for Appellees, Walker Bank Building, Salt Lake City, Utah 84111; Roger F. Cutler and David A. Goodwill, Attorneys for Appellant, Cross-Plaintiff, 602 East 300 South, Salt Lake City, Utah 84102, and James S. Jardine, Ray, Quinney & Nebeker, 400 Deseret Building, Salt Lake City, Utah 84111 this \_\_\_\_\_ day of \_\_\_\_\_, 1976.

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